LOO KECK LEONG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
PEH SWEE CHIN SCJ
EDGAR JOSEPH JR SCJ
[CRIMINAL APPEAL NO. 05-100-91]
24 APRIL 1992

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Definition of 'cannabis' - Chemist carried out three tests to determine if substance was cannabis - Whether resin was extracted from the three tests - Benefit of doubt to be given to appellant - Whether cannabis involved was of the genus cannabis.*

In this case, the appellant was charged at the High Court, Alor Setar for trafficking in cannabis. He was convicted and sentenced to death.

The point in question, a short, comparatively novel point arose in connection with the definition of cannabis in the Dangerous Drugs Act 1952 in reference to the evidence of the chemist in this case.

Held:

[1] The fairer interpretation of the definition clause of "cannabis" ought to be that the resin should have been substantially extracted (but not necessarily without a trace in the residue) and not necessarily that the same should have been completely extracted so that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug - a harmless substance.

[2] In view of the evidence of the chemist, the benefit of doubt as to whether resin has been so substantially extracted ought to be given to the appellant.

[3] Bearing in mind the benefit of doubt mentioned above, the appellate Court was not satisfied in this case that the prosecution has proved beyond reasonable doubt that the cannabis involved in this case was of the genus Cannabis as defined by the Act as alleged by the chemist in question.

[Appeal allowed. Conviction and sentence set aside. Appellant acquitted and discharged.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR JENAYAH: *Dadah berbahaya - Pengedar dadah berbahaya - Takrif 'kanabis' - Ahli kimia menjalankan 3 ujian untuk menentukan samada bahan adalah 'kanabis'- Samada 'resin' dikeluarkan dari 3 ujian - Faedah kesangsian hendaklah diberikan kepada perayu - Samada 'kannabis' yang terlibat adalah dari 'genus kanabis'.*

Di dalam kes ini perayu dituduh di Mahkamah Tinggi Alor Setar kerana mengedar kanabis. Dia didapati salah dan dijatuhkan hukuman mati. Perkara yang dipersoalkan, walaupun agak pendek namun penting iaitu mengenai *takrif/definasi* 'kanabis' dibawah Akta Dadah Berbahaya 1952 dalam merujuk kepada keterangan ahli kimia didalam kes ini.

Diputuskan:

[1] Tafsiran yang lebih adil terhadap definasi fasal 'kanabis' sepatutnya adalah bahawa resin hendaklah dikeluarkan secara substantial (tetapi tidak semestinya tanpa sebarang kesan didalam bakinya) dan tidak semestinya ianya mesti dikeluarkan sepenuhnya hingga menyebabkan bahan tumbuhan bersangkutan didalam sebarang keadaan dan untuk segala tujuan praktikal dari menjadikannya dadah merbahaya - satu bahan yang tidak bermudarat.

[2] Melihatkan keterangan ahli kimia, faedah keraguan samada resin telah dikeluarkan secara substantial, patut diberikan kepada perayu.

[3] Dengan mengambil kira kepada faedah keraguan yang disebutkan diatas Mahkamah Rayuan tidak berpuashati didalam kes ini yang pihak pendakwa telah membuktikan tanpa sebarang keraguan yang kanabis yang terlibat di dalam kes ini adalah genus kanabis sebagaimana yang di definasikan oleh Akta yang berkenaan sebagai yang didakwa oleh ahli kimia yang berkenaan.

[Rayuan dibenarkan. Kesabitan dan hukuman diketepikan. Perayu dibebaskan dan dilepaskan.]

Cases referred to:

PP v. Syed Bakri [1955] MLJ xvii ***(foll)***
Mee Lian Co. v. PP [1962] MLJ 131 ***(foll)***
Munusamy v. PP [1987] CLJ (Rep) 221 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, s. 2
Evidence Act 1950, s. 114 illus. (e)

For the appellant - Jeffrey Fernandez (S. Selvarajah with him); M/s. Fernandez & Co.
For the respondent - Jalaldin b. Hussain, DPP

[Ed. Note: The decision of the High Court was reported in [1991] 3 CLJ (Rep) 604.]

JUDGMENT

Peh Swee Chin SCJ:

A short, comparatively novel point with such a great deal of potential repercussions in future was involved, we deemed it fit to reserve judgment for time to consider it. We now deliver our judgment.

Before dealing with this point, it would be desirable to deal with other points of this case compendiously, if possible.

We do not think that the findings of fact in regard to possession and the way the learned trial Judge has dealt with the defence evidence, apart from the point in question, could give raise to any valid criticism at all, neither were these findings in fact challenged seriously, and this Court cannot but uphold them. Suffice it to say that the accused here was charged with trafficking in cannabis and was convicted and sentenced to death by the High Court.

The point in question has arisen in connection with the definition of cannabis in the Dangerous Drugs Act 1952 (hereinafter called the Act) in connection with the evidence of the chemist in this case. Cannabis is defined in s. 2 as follows:

> "Cannabis" means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated.

The chemist in the present in evidence said he analysed the incriminating exhibits seized from the accused and found them to be cannabis. He said, to quote, "By cannabis I mean cannabis as defined in the Dangerous Drugs Act 1952".

It has been pressed in arguments by the learned defence Counsel for the appellant before us to the effect, that it was the prosecution's duty to prove that the "cannabis" on which the chemist carried out the three tests he described, was cannabis material from which resin has not been extracted, and that from the chemist's evidence, this was not proved.

We would refer to his evidence in some detail. The chemist said in answer that he had carried out three tests to determine if the substance was cannabis.

The first test was microscopic examination for the purpose of determining in turn the presence of systolic hair which was a characteristic feature of cannabis and also the presence of grandular (sic) hair.

In cross-examination he agreed the same hairs were found in other plants.

The second test, he said, was Dequinois Levine test, a colour test.

In cross-examination, he agreed to the effect that the same colour that had emerged from the second test he conducted would have similarly appeared in nutmeg for example, that there were certain substances and some weeds which would yield the same colour if similarly tested. He agreed with Counsel that this second test was not a "confirmative test" but was merely a "presumptive test".

The third test was called TLC test - a qualitative test, which confirmed the presence of cannabis resin, which would seem to us to be the soul of a cannabis plant, in retrospect.

He agreed to the effect in cross-examination that even the presence of a trace of such cannabis resin could be found by this test. He agreed that this was a sensitive test; to quote: "Say per thousand, a microgram - which is a thousand (sic) part of a thousand".

He said to the effect further that if he could detect the presence of the resin in the substance, the resin had not been extracted completely. He agreed further to the effect if the resin had been extracted there was a possibility that there might still remain an insignificant trace of the resin.

He said he was not aware that cannabis plant could be used for cooking after the extraction of the resin.

He said, in answer to questions from the learned trial Judge, that taking the results of the tests (he carried out) in their totality, he confirmed that the exhibits were cannabis; but he further said to the effect that he could not tell if the exhibits or the plant material had undergone any process through threshing or through chemical solvents meant to extract the resin therefrom. He could not tell if any solvent had been used to dissolve the resin from the said plant material he examined. He said that it needed though "quite a bit" of presence of cannabis to give the colour in the Dequinois Levine test.

Before commenting on the evidence of the chemist, the premise from learned Counsel's submission appears to us to be that the matter or question of non-extraction of the resin from the genus cannabis is an ingredient of the offence on a charge of trafficking in the cannabis.

We are of the view that when Parliament has defined cannabis, the definition should be adhered to as closely as possible, consequently for the same reason we suppose, when giving evidence in the instant case, the chemist stated that he had analysed the plant material and found it to be cannabis "as defined in the Dangerous Drugs Act 1952", the implicit irresistible inference from his evidence would be that the resin had not been extracted from it. The present definition of cannabis (as amended) came into force on 14 February 1983, after having gone through a few previous amendments.

The words used in this definition seem to be plain enough in the ordinary and literal meaning of the words save that they do not say how much of the resin should not be extracted, or whether it should be extracted completely, and about this we will say more later. For the present, it is important to emphasize that the words must be given special weight for Parliament in its wisdom must be presumed to have been precise in the choice of words in the definition section. The words used do not impress us at all as being idle surplus words but on the contrary they appear to give some special emphasis on the question of extraction, or non-extraction of the resin.

In considering the evidence of the chemist, with reference to the definition, it is also to be borne in mind specially, that as a rule, prosecutors ought to follow as closely as possible the statute in framing their charges, see a similar *dictum* of Thomson CJ as he then was in *PP v. Syed Bakri* (unreported case) as set out and noted in 1965 (MLJ) xvii. The other basic principle would be that the prosecutors must prove beyond a reasonable doubt all the ingredients of the charges, see e.g., the *dictum* to the same effect from Adams J in *Mee Lian Co. v. PP* [1962] MLJ 131.

It is also axiomatic to say that if it is the duty of prosecution to prove any ingredient, of an offence, the defence would be relieved from having to established the lack of such an ingredient.

In considering the definition clause and the evidence in relation to it, it would be salutory to bear it in mind that the very definition clause of cannabis in the Act is, beyond argument a component of a penal provision of the Act affecting personal liberty and such it would have to be strictly construed in favour of such liberty.

We therefore hold that the non-extraction of resin from any part of the plant of genus Cannabis is an ingredient of the charge of trafficking in cannabis is an ingredient of the charge of trafficking in cannabis. The ingredient, being a matter of science and not being a question of ordinary fact normally perceivable by the senses is deemed to have been proved by usually a pithy statement by the chemist that it is cannabis as defined in the Act as in the instant case unless it is challenged. It was challenged in this case - it will be dealt with more fully later.

Despite strictures from this Court in the past about the evidence of the chemist not to be challenged unnecessarily and extensively, e.g. please see *Munusamy v. PP* [1987] CLJ (Rep) 221 for example, they are aimed at aimless or unnecessary cross-examination in the nature of fishing expeditions, and would not apply to a challenge of substance as raised in this case touching on the very elementary nature of the cannabis.

We next consider if the challenge is successful. After considering the evidence of the chemist, one is left with a troubled sense of uncertainty that he was not certain at all if the process of extraction of resin had been applied to the plant material in question though it would have been that easy for him to have said that it had not been extracted, if he had no doubt about it.

The first test described above can be seen to be anything but conclusive and the second test was said to be a "presumptive" test and not a confirmation test. The third test however is pivotal as it confirmed the presence of the resin.

To have detected the presence of resin, would not necessarily lend to proof beyond a reasonable doubt in this case that resin had not been extracted. The chemist himself was unsure whether it had been extracted at all and if so how much, but he admitted that the third test was sensitive but denied it was very sensitive yet he said it could detect the presence of even one 'microgram' that is, a very much smaller unit than one milligram or one gram. A gram is equal to 1,000 milligrams. The attributive "micro-" can mean only the unit is so small that it can only be visible under a microscope. The third test could detect even a trace of the resin and the chemist agreed that it was possible there might be an insignificant trace of the resin remaining after the resin had been extracted.

The learned trial Judge who has otherwise given an impeccable judgment (save on the definition of cannabis) appears to have held that the resin should be completely extracted before the possession of cannabis ceased to be an offence under the Act. We regret we have to differ from him in this respect, for the word "completely" or words to similar effect are not in the definition clause neither is such view consistent with the way in which the definition clause ought to be construed, when it affects personal liberty or worse.

The fairer interpretation of the definition clause in this aspect ought to be that the resin should have been substantially extracted (but not necessarily without a trace in the residue) and not necessarily that the same should have been completely extracted so that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug - a harmless substance. In view of the evidence of the chemist, we feel that the benefit of doubt as to whether the resin has been so substantially extracted ought to be given to the appellant.

We have nonetheless felt some unease in differing from the learned trial Judge on this point because of our concern for the possible "floodgates". We conclude however, such concern is actually more apparent than real.

In cases where this particular point of non-extraction of resin has not been raised, we would regard them to be imperturbable on this score for proof of this ingredient is deemed sufficiently to have been done when the chemist in each case has said that he found the substance in question to be cannabis within the definition of the Act. The Court has a discretion to presume that official acts have been regularly performed, see s. 114, illustration (e) of Evidence Act 1950.

This presumption is of course a rebuttable and optional presumption, based upon the common experience of mankind. It is applicable having regard to facts and circumstances of each case, and especially the absence of objection from the party to whom such presumption could be detrimental.

The Court here would not so presume herein in view of the objection raised by the defence to the elementary nature or quality of exhibit and the evidence of the chemist herein makes it eminently inappropriate to employ the presumption to supply the deficiency in the proof of the ingredient that resin has not been so extracted.

Bearing in mind the benefit of doubt mentioned above, we are not satisfied in this case that the prosecution has proved beyond a reasonable doubt that the cannabis involved in this case was of the genus cannabis as defined by the Act as alleged by the chemist in question.

We therefore allow the appeal; set aside the conviction and the death sentence imposed and order that the appellant be acquitted and discharged.

Also found at [1992] 3 CLJ 1332